United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 17, 2006

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Celanese Emulsions GmbH
Case 33-CA-14957 [DIGEST NOS. ON LAST PAGE]

The Region submitted this case for advice on whether the Employer violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith from the time contract negotiations began or, in the alternative, from the date on which the Employer submitted a regressive contract proposal. The resolution of that issue will affect whether, and from what date, the Employer's lockout violated Section 8(a)(1), (3), and (5). The Region also requested advice on whether the Employer cured its refusal to provide information the Union had requested to evaluate the Employer's claim of having set production records during the lockout.

We conclude the Employer bargained in bad faith from the outset of negotiations. We also conclude that, at a minimum, the Employer began bargaining in bad faith when it submitted a regressive proposal. Accordingly, we conclude that the lockout was unlawful. Finally, we conclude that the Employer was obligated to timely provide the requested information regarding its productivity during the lockout.

FACTS

In 2004, Celanese Emulsions GmbH ("the Employer") purchased certain emulsion departments from National Starch and Chemical Company that were located at the latter's plant in Meredosia, Illinois. Boilermakers Local Lodge 484 ("the Union") has represented the production and maintenance employees at the Meredosia facility for over 50 years. On January 4, 2005,[1] the Employer recognized the Union as the exclusive bargaining representative for the 150 or so production and maintenance employees, agreed to be bound by the existing contract between National Starch and the Union, and agreed to extend that contract for 120 days after the Employer began operating the facility.

[1] All dates are in 2005 unless otherwise indicated.

Under that prior contract, which had a term of January 16, 2004 to January 16, 2005, hourly wages were as follows:

- helpers/janitors/warehousemen: $20.18
- assistant operators: $21.36
- maintenance employees: $21.67 or $21.75
- operators: $21.83 or $21.95.

The 2004-2005 contract did not require current or retired unit employees to contribute anything for their health insurance benefits. It also provided that in the event of an active employee's death, his or her spouse and eligible dependents would continue to be covered by the medical and dental plan for a period of six months. The contract set the accidental death and disability benefit at two times base pay and listed Fidelity Investments as the 401(k) provider with a 3% employer matching contribution.

On February 5, the Employer began operating the Meredosia plant, which meant that the 120-day contract extension would run to June 4. Also on February 5, the Employer unilaterally changed the unit employees' health insurance provider from UniCare, as set forth in the 2004-2005 contract, to Aetna.[2] Around this time, Kroeschell, Inc., a temporary employment agency based in Illinois, began advertising that it was seeking maintenance workers for the Employer's Meredosia facility.

The Employer asserts that in March it conducted an area wage survey that showed wages and benefits at the Meredosia facility far exceeding the area standard and those at its other facilities. The Employer asserts that it also had a business consultant review operations at the facility at this time. The consultant recommended that the maintenance department be reduced from 29 to 11 employees and that it

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[2] The Employer asserts that because UniCare would not provide health insurance coverage for the 120-day contract extension, it arranged for Aetna to administer the old UniCare plan during that period. By memorandum dated January 31, National Starch informed the employees that the Employer had its insurance provider, Aetna, "design a plan that mirror[ed] the UniCare plan" for the 120-day period. The Union filed a charge (Case 33-CA-14886) alleging this conduct as a unilateral change that violated Section 8(a)(5). The Region deferred the charge under Collyer Insulated Wire, 192 NLRB 837 (1971). However, the Region has indicated that it will revoke deferral if it is directed to issue complaint in the current case.

was most efficient to contract out the maintenance, warehouse, and janitorial functions.

By letter dated March 31, the Union requested that the parties begin bargaining for a successor collective-bargaining agreement. The letter also contained several information requests, including "the most recent average straight time hourly earnings report ... [and] an itemized list of fringe benefits and cents-per-hour cost of each, as well as a complete copy of any ... health insurance plan ... in effect for bargaining unit employees." Subsequently, the Union and the Employer agreed that negotiations would begin on May 12. The Employer did not respond to the information requests contained in the March 31 letter.

On May 12, the parties held their first negotiation session. The Employer started the meeting by stating that the Meredosia facility did not meet the Employer's safety standards, was the Employer's least competitive emulsion plant, and had low maintenance productivity. The Employer stated that it sought flexibility and that cost cuts would not come from the unit employees. The Union then presented a complete contract proposal, including economic terms. Among other things, the Union proposed a $25 per hour wage increase. Although the Employer also had prepared a complete contract proposal, including economics, it requested that the parties first bargain over non-economic issues. The Union did not object and the Employer only presented its non-economic proposals.

At the parties' second negotiation session, on May 13, the Union requested a copy of the sales agreement between the Employer and National Starch. The parties then met eight times from May 17 to May 27 and bargained over non-economic issues. By letter dated May 20, the Union also repeated its request for the average hourly benefits rate. During this period, the parties reached tentative agreement on most non-economic terms affecting the maintenance, warehouse, and janitorial employees. The parties also tentatively agreed on certain vacation terms, including the number of vacation days per year of service and that employees could carry over eight vacation days, and on the code of conduct provision.[3]

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[3] Regarding vacation days per years of service, the tentative agreement provided a maximum of 5 days for employees with up to one year of service, 10 days for employees with one to five years, 15 days for employees with six to nine years, 20 days for employees with 10 years, and then another day for each additional year of service until 20 years, when an employee would receive 30 days.

At the May 25 session, the Union asked when it could see the Employer's economic proposal, expressing concern that the 120-day contract extension would expire on June 4. The Employer responded that it hoped to make an economic proposal by May 31. The Employer also said that it would have an individual from its corporate office present at the May 31 session to answer the Union's health insurance questions.

On May 31, the parties held their eleventh bargaining session and the Employer made its first economic proposal. The Employer offered the employees a choice of two Aetna health insurance plans, either the POS II or the Out-of-Area plan, and a dental plan. The Employer provided the Union with a chart comparing the employees' current health plan (i.e., the Aetna plan the Employer unilaterally implemented on February 5) with those being proposed. The Employer's benefits representative was present to explain the health insurance plans and to answer the Union's questions. Due in part to a lack of network doctors around Meredosia, the Union asked if Aetna was the only choice. The benefits representative stated that the Union could shop around for a better health plan. The Union orally requested copies of the health insurance plans.

Around 8:30 p.m. on the same day, the Employer made its full economic proposal. It offered a yearly wage increase of $0.25 per hour to all unit employees except helpers, which comprise about 50 of the 150 unit employees. It also proposed that all unit employees, including helpers, would receive a $750 bonus for the first year of the contract, a minimum bonus of $750 with an additional performance-based bonus for the second year, and performance-based bonuses for years three and four. No criteria were set forth for the performance-based bonuses. The Employer also proposed having current unit employees pay a set amount of their health insurance costs for 2005,[4] eliminating health insurance benefits for retirees after 2005, and substituting COBRA coverage for the death-of-an-active-employee benefit. As for the remaining economic terms, the Employer proposed reducing the accidental death and disability benefit from two to one times base pay, did not propose any increase in pension plan contributions, and proposed changing the 401(k) provider from Fidelity Investments to JP Morgan. Regarding the last term, the Employer proposed increasing its matching contribution from 3% to 4% of an employee's pre-tax contribution.

[4] The Employer's health insurance proposal required employees to pay 20% of the cost after 2005.

At the June 1 session, the Employer distributed a chart showing the employees' health insurance contribution levels through 2008.[5] After the Union said that it wanted to shop around for a better health insurance plan, the Employer stated that it had misspoke the previous day and that it was only interested in Aetna. After discussing health insurance, the Union asked to further extend the current contract, but the Employer did not respond. The Employer then said that unlike in the expiring contract, it could not agree on a minimum number of maintenance employees. When the parties turned to helpers' wages, the Employer stated that its wage proposal was based on an area wage survey. The Employer provided the Union with a copy of the survey. The Union revised its wage proposal and asked for a yearly wage increase of 10% per hour, which was an average raise of $2.14 per hour in the first year. The Employer increased its wage proposal to $0.30 per hour per year for all unit employees, except helpers. The Employer also increased the bonuses for years one and two to $900, while retaining the language on performance-based bonuses. It also proposed increasing the 401(k) matching contribution to 5% and offering health insurance to retirees at the same rates current unit employees would pay. The parties reached tentative agreement on transferring the 401(k) plan to JP Morgan and on the 5% matching contribution. The Union submitted a written request for copies of the health insurance plans and orally requested information about the pension plan, including the name, address, and telephone number of the pension plan administrator.

At the beginning of the June 2 session, the Employer submitted a third economic proposal. The Employer increased its hourly wage offer to $0.35 per year. It also increased the bonuses for years one and two to $950, while retaining the language on performance-based bonuses. At 9:30 p.m., the Employer delivered a notice to the Union stating that absent agreement on a new contract before the current one expired on Saturday, June 4 at 7 a.m., the unit employees would be locked out at 11 p.m. on Sunday, June 5.[6] The Employer then submitted a fourth economic proposal. On

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[5] While this chart shows fixed rates for 2005 through 2008, the Employer stated that the rates after 2005 were unknown because they would be based on increases or decreases in plan costs. Regardless of what the actual cost was, the Employer continued to propose that employees contribute 20% after 2005.

[6] The Employer's lockout notice used the wrong dates. Thus, it referred to "Saturday, June 5," and "Sunday, June 6."

wages, it offered a yearly increase of $0.45 per hour to all unit employees, except helpers, who would receive lump sum payments of $900 in each year of a three-year contract.[7] All employees, including helpers, would receive $1000 bonuses in years one and two and the language on performance-based bonuses was eliminated. The parties tentatively agreed that shift differential pay would increase from $0.50 to $0.55 per hour.

At the June 3 session, the Employer presented the Union with its last, best, final offer, although the document that it initially presented to the Union did not include many of the parties' prior tentative agreements. The Union requested a 60-day extension of the current contract so it could attempt to improve on the health insurance network and verify the Employer's numbers on health insurance costs. The Employer refused and at 5:20 p.m. presented the Union with its final offer, which now contained most of the parties' tentative agreements.[8] The final offer essentially reiterated the terms of its fourth economic proposal.[9] The Union made an oral counteroffer, which included capping weekly employee health insurance contributions for the duration of the contract at $5 for employee only, $10 for employee plus one, and $20 for family coverage.[10] The Union continued to propose a 10% per year across-the-board wage increase, except that newly hired helpers would receive a slightly reduced starting rate. The Employer rejected the Union's counteroffer. In response to a question from the Union, the Employer stated that the unit employees would be locked out if a contract was not reach by 7 a.m. the next

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[7] Based on a 52 week, 40 hours per week schedule, these lump sum payments would amount to an additional $0.43 per hour. The Employer made clear that the helpers' base wage would remain at $20.18 per hour, i.e., the amount in the expiring contract.

[8] Some tentative agreements were inadvertently omitted.

[9] In this proposal, the Employer stated that helpers and janitors would not receive the proposed $0.45 per hour per year wage increase.

[10] The Employer's proposal for the 2005 employee medical insurance premiums was $13.19 per week for employee only, $26.38 per week for employee plus one, and $42.21 per week for family. Under the Employer's proposal, these numbers would change in subsequent years because employees were responsible for 20% of health insurance costs after 2005. The proposal required separate employee contributions for dental coverage.

day, and would end when the unit employees ratified the contract. During this session, the parties tentatively agreed that the increase in shift differential pay and the Employer's 5% matching contribution for the 401(k) plan would be retroactive to January 16. The Union also reiterated its request, in written form, for certain pension plan information, including the name, address, and telephone number of the pension plan administrator.

That evening, at 7 p.m., the Union held a membership meeting. The members had several concerns, including having to pay for their health insurance, the helpers not receiving a wage increase, and switching the 401(k) plan from Fidelity to JP Morgan. The members decided they could not hold a ratification vote until the Employer provided the requested information on the average hourly wage and benefit rate, the health insurance plans, and the pension plan. The Union asserts that it did not receive a copy of the Aetna POS II summary plan description until the next day, June 4.

On June 5, the Union again offered to extend the current contract. The Employer again refused and, at 11 p.m., locked out the unit employees. Because the Employer had temporary replacements waiting to assume operation of the facility, there was no hiatus in production. The Employer used different temporary employment agencies to acquire temporary replacements, including Teamworks, Inc. for production employees and Kroeschell, Inc. for maintenance employees.[11] These contracts can be cancelled with seven days' notice. Supervisors and managers also performed unit work. The Employer changed from a schedule of three, 8-hour shifts, to a schedule of two, 12-hour shifts. The Employer also hired a security firm, Special Response Corp., which was present when the lockout began. On or about June 6, the Union established a picket line at the entrance to the facility.

The Employer informed the Union that it would not negotiate again until the Union held a ratification vote on the Employer's final offer. In the days immediately following the lockout, the parties dealt with information requests. On June 10, the Employer provided the Union with the average hourly wage and benefit rate and the Union asserts that it received a copy of the Aetna Out-of-Area plan on the same day. On June 13, the Union faxed two information requests to the Employer. In the first, the

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[11] Teamworks specializes in providing replacement workers during labor disputes. On July 1, the Employer entered a contract with a local temporary employment agency, Unique, to provide production and warehouse employees.

Union repeated requests for a copy of the dental plan summary description and certain pension plan information. The Employer, in a same day response, provided a copy of the dental plan summary but stated that it already had provided the Union with 160 copies of that plan. The Employer also stated that it did not have the requested pension plan information because the plan assets had yet to be transferred to it from National Starch. On the same day, the Employer informed the Union that it would not disclose the sales agreement with National Starch because it contained confidential information. The Union stated that it needed the sales agreement for pension, medical, and retiree issues. The Employer instructed the Union to limit its request to those portions of the agreement dealing with the Meredosia facility so as to avoid confidentiality issues. The Union submitted a revised request to accommodate the Employer's confidentiality concerns, and the Employer denied it on June 15.

On June 15, the Union held a membership meeting. The members were still reluctant to vote on the Employer's final offer; they felt they did not have adequate information to assess the proposal because the Employer had yet to respond to all of the Union's information requests. The Union explained that the Employer would not resume negotiations until a ratification vote was held. The members voted and rejected the final offer by 145 to 2.

On June 28, the parties held their first post-lockout negotiation session. The Union stated that one major problem was that the Employer's final offer did not give helpers a wage increase. The Employer replied that helpers would have received a raise if the Union had not rejected an earlier proposal to convert production helpers to assistant operators.[12] The Union denied that the Employer had ever made such an offer, the Union's bargaining notes did not mention it, and there was no such written proposal. After the Union asked how many employees this would affect, the Employer said it applied to 32 production helpers, but not to 25 non-production helpers. The Union accepted this offer and made a counter-proposal to the Employer's final offer. It proposed a five-year contract with yearly across-the-board wage increases of $0.75 per hour, bonuses of $1000 for years one and two, performance-based bonuses for years three through five, and caps on weekly employee health insurance premiums as follows: $10 for employee only; $20 for employee

[12] This would have resulted in a wage increase of about $1.63 per hour to the production helpers. This figure represented a $1.18 per hour increase due to the change in classification, plus the proposed $0.45 per hour raise.

plus one; $30 for family coverage. The meeting ended without the parties reaching agreement.

At the July 6 session, the Employer began by distributing a document entitled "Talking Points" to the Union bargaining committee. The document stated, in relevant part,

> We offered you a generous proposal that seemed to [be] a reasonable step considering the efficiencies and savings we need to realize to make Meredosia competitive. Yet, you the Union leadership, decided to ignore all the data presented showing Meredosia to be 40% less productive than our other plants, and elected to advise your membership to reject our proposal.
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> * * *
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> [Y]ou continue to ignore the cost disadvantages we have in the area of pay and benefits. You were given data that revealed Meredosia pay rates to be the highest or second highest in the area.
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> * * *
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> [Y]our counter is far from being anywhere close to our proposal. Your counter reveals a complete misunderstanding of the reality of the situation.
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> * * *
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> During [the lockout] we have learned that we can be more competitive by outsourcing some non-operations functions. We have also learned that we can operate at less cost and with fewer personnel in our process areas.
>
> Therefore, we are rejecting your counter, withdrawing our last proposal, and are submitting a new proposal based on what we now know and on a comparison model of our other plants, made up of proven methods to be more efficient and cost effective.

The Employer's new proposal reduced the helper wage rate to $14 per hour and the assistant operator wage rate to $17 per hour, reductions of about $6 and $4 per hour, respectively, from existing wages. Depending on their specific classification, operators would be paid either $20 or $22 per hour. The proposal did not include any wage increases or bonuses for its three-year term. The Employer

also proposed contracting out all of the maintenance, warehouse, and janitor functions, thereby eliminating 37 unit positions, or almost 25% of the unit. The Employer also proposed that the increases in shift differential pay and the 401(k) matching contribution to which it had previously agreed would not be retroactive and it eliminated the code of conduct to which the parties had previously agreed. The Employer's new proposal also withdrew from prior tentative agreements on vacation, including the elimination of carry-over days and altering the number of vacation days that employees would receive based on years of service.[13]

During this session, the Union questioned whether the Employer was operating during the lockout. In response, the Employer's lead negotiator stated that not only was the Employer operating, it was setting production records. The Union requested data to support that assertion, and the Employer agreed to provide it.

After the Employer presented its new proposal, the Union made a counteroffer. It proposed a five-year contract with yearly wage increases of $0.65 per hour for all unit employees. It also proposed a bonus of $1000 in the first year, a minimum bonus of $1000 in the second year, and reinserted the Employer's performance-based bonus language. The Union proposed capping employee health insurance premiums at 2005 levels for the duration of the contract.[14] The Employer stated that the Union's counteroffer was not even close. When the Union asked if the Employer's new position was in retaliation for the members rejecting the prior offer, the Employer replied that it came down to helpers' wages and health insurance costs.

At the July 7 session, the Employer made only minor changes to its previous proposal, except that it now sought a four-year contract.[15] During negotiations, the Employer

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[13] The Employer's new vacation proposal gave 5 days to employees with three to six months of service, 10 days to employees with over six months to less than five years, 15 days to employees with five to nine years, 20 days to employees with 10 or more years, and 25 days to employees with 20 or more years. The Employer's proposal was stated in terms of hours (i.e., 40, 80, 120, 160, 200 hours).

[14] In 2005, the weekly premiums were $13.19 for employee only, $26.38 for employee plus one, and $42.21 for family.

[15] The Employer also withdrew its proposal to change holiday pay to one and a half and two times the regular rate. The Employer also withdrew its offer to negotiate a side

repeated that it was setting production records with less labor during the lockout. When the Union again requested supporting data, the Employer's lead negotiator said he would provide even more data than the Union wanted. He later stated that he was basing his remarks on estimated data rather than real numbers.

The Union again requested a copy of the sales agreement between the Employer and National Starch. The Employer again denied the request based on confidentiality. The Union also repeated its request for certain pension plan information. The Employer repeated that it would not have that information until the plan assets were transferred to it. The Union then presented a counteroffer, which was its counter from the previous day except that it now proposed a four-year contract.

During this session, the Employer asked if it had to offer something better than its June 3 final offer, because it would not go back to that offer. The Employer stated that it did not need to raise wages and that the employees had to pay their share of the health insurance costs. When the Union stated that subcontracting maintenance would not get the parties to a contract, the Employer responded that it was more economical to subcontract maintenance and that it would get the Union the data supporting that assertion.

The Union then presented its second counteroffer of the day. The Union proposed a four-year contract with a $0.55 per hour raise for the first year for all unit employees. It proposed a $0.55 per hour raise for each of the remaining three years for all unit employees, except helpers and janitors. The latter classifications were to receive $900 bonuses in each of the last three years. The Union also proposed that all unit employees receive $1000 bonuses in each of the first two years. Finally, the Union proposed capping medical and dental premiums for the duration of the contract at the Employer's proposed 2005 rates. The Employer stated that there was major movement, but the meeting adjourned without the parties reaching agreement.

On July 11, the Employer telephoned the Union and stated that it was not interested in moving off of its July 7 proposal.

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agreement on severance in the future and offered "1 week's pay for up to 20 years with 2 week's pay for each year over 20." Finally, the Employer eliminated a sentence to the call-in protocol that required all personnel to be trained and qualified in the position for which they were called.

By letter dated July 13, the Union requested from the Employer, among other things, the names, addresses, and wage and benefit rates of all temporary replacement employees.

On July 19, an Illinois state court issued a temporary restraining order against the Union for picket line misconduct. Two days later, the Employer denied the Union's request for the names and addresses of all replacement employees based on the Union's alleged picket line misconduct, and the following day filed a Section 8(b)(1)(A) charge against the Union in Case 33-CB-4102 alleging repeated instances of picket line misconduct. The Employer obtained a permanent state court injunction on July 28 that limits the number of picketers to no more than six and prohibits them from engaging in any intimidating behavior toward the replacement workers.

On August 4, the parties met with a federal mediator. Through the mediator, the Employer asked the Union to list all of its outstanding information requests. Among other things, the Union requested the name, address, and phone number of the pension plan administrator, the sales agreement between the Employer and National Starch as it pertained to the Meredosia facility, and the production records the Employer had set since the lockout began.[16] The Union stated that it was waiting for the Employer to make a counter-proposal to its last offer. The Employer agreed and the meeting ended.

On August 5, the Employer submitted a written response to the Union's information request. It provided the name, address, and phone number of the pension plan administrator, again denied the Union's request for the sales agreement, and listed three production records that had been set since the lockout began.

On August 12, before the parties' mediation session began, the mediator presented the Employer's counteroffer to the Union. It did not differ from the Employer's July 7 proposal. The Union presented the Employer with a letter in which it accused the Employer of regressive and surface bargaining and requested additional information. The letter stated, in relevant part,

> The union contends that the information received from the June [labor and expense] report does not

[16] This list did not request any additional copies of the current or proposed health insurance plans or the wage and benefit rates of the temporary replacements.

> substantiate the company's position of regressive bargain [sic]; therefore the union is requesting the following information in order to further evaluate the company's position on your recent proposal.
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> - July [labor and expense] report
> - Customer complaints since 1/1/05
> - List of products produced and pounds produced for each product number
> - Amount of reject and rework produced since 6/1/05
> - Copy of all [quality control] sheets since 6/1/05
> - Copy of [certificates of analysis] since 6/1/05
> - Copy of bill of lading for all shipments since 6/1/05
> - Copy of all goods received

After the mediator asked the parties if there was any point in continuing the session, both parties said no and the meeting ended.

On August 25, the Employer provided a written response to the Union's information request. It supplied a copy of the July labor and expense report and referenced an attachment with the list of products produced and pounds produced for each product number. The Employer stated that it had 16 customer complaints since January 1 and that it had 124,000 pounds of reject or rework produced since June 1. In responding to the Union's request for copies of quality control sheets, certificates of analysis, bills of lading, and invoices for goods received, the Employer stated only the number of documents associated with each request, but did not provide copies. The Employer's response also stated,

> [P]lease keep in mind that we are operating the plant to our satisfaction with fewer employees, at lower labor rates, and contracting out support functions like maintenance.... We realize there is no amount of information that we can deliver to you that will convince you we are operating the plant to your satisfaction.... What is important is that Celanese is satisfied with how the Meredosia facility is being operated, and your repeated requests for production information and operating data are completely irrelevant to our bargaining.

The Union analyzed the Employer's June and July labor and expense reports to determine if the Employer actually had operated at less cost after the lockout began. According to the Union, in comparison to pre-lockout costs, the Employer's operating costs actually increased in the two months after the lockout.

The Union filed this charge on August 25. On September 30, the Region issued a Section 8(b)(1)(A) complaint against the Union in Case 33-CB-4102 that alleges the Union had engaged in several acts of picket line misconduct from June through July.[17]

On October 19, the parties met again and the Employer made an oral modification to its July 7 proposal. It offered to allow employees the option to purchase supplemental accidental death and disability insurance. The Union stated that it was sticking with the second counter-proposal it had made on July 7.

Although the parties met on various dates in November and December, they were unable to reach agreement. On December 19, the Employer filed a Section 8(b)(3) charge (Case 33-CB-4130) against the Union in which it alleged that the Union was bargaining in bad faith by insisting to bargain from the Employer's final pre-lockout offer and refusing to bargain from the Employer's regressive July 6 offer. [*FOIA Exemption 5*

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ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1), (3), and (5) of the Act. The Employer's pre-lockout bargaining conduct, particularly its failure to timely provide the Union with requested information, demonstrated an intent to frustrate negotiations and constituted bad-faith bargaining that violated Section 8(a)(5) and (1). At a minimum, the Employer has been bargaining in bad faith since July 6, when it withdrew from numerous tentative agreements and substituted a regressive contract proposal. Because the Employer locked out its employees in furtherance of this illegitimate bargaining position, and because the Employer had failed to timely provide requested information, the lockout violated Section 8(a)(5) from its inception and, alternatively, no later than

[17] The hearing for that case is postponed indefinitely.

July 6. The lockout also violated Section 8(a)(3) because the Employer instituted it to avoid its bargaining obligation. Finally, the Employer violated Section 8(a)(5) and (1) by failing to provide the Union with relevant information concerning its productivity during the lockout.

I. THE EMPLOYER ENGAGED IN BAD-FAITH BARGAINING FROM THE OUTSET OF NEGOTIATIONS, OR ALTERNATIVELY NOT LATER THAN JULY 6, WHEN IT SUBMITTED ITS REGRESSIVE PROPOSAL

In general, the duty to bargain in good faith requires an employer and union "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement."[18] To determine whether or not a party has bargained in good faith, it is necessary to examine its overall conduct.[19] Conduct indicating a lack of good faith bargaining includes dilatory or evasive bargaining tactics,[20] the refusal to provide relevant information in a timely manner,[21] offering final proposals with insufficient time to consider them,[22] the withdrawal of tentative agreements, and unreasonable bargaining demands.[23]

A. The Employer Engaged in Bad Faith Bargaining from the Outset of Negotiations

We conclude that the Employer bargained in bad faith because its conduct from the outset of negotiations evinced a desire to avoid reaching agreement. The first glimmer of the Employer's bad faith toward negotiations occurred in response to the Union's opening request to begin negotiations. The Union first requested commencement of negotiations in its letter of March 31. Yet, without explanation, the Employer responded that it was ready to begin meeting on May 12. This response immediately limited

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[18] NLRB v. Herman's Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960), quoted in Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

[19] See, e.g., U.S. Ecology Corp., 331 NLRB 223, 225 (2000), enfd. 26 Fed. Appx. 435, 169 LRRM 2320 (6th Cir. 2001).

[20] See, e.g., Whisper Soft Mills, 267 NLRB 813, 815 (1983), revd. on other grounds 754 F.2d 1381 (9th Cir. 1984).

[21] See, e.g., Bryant & Stratton Business Institute, 321 NLRB 1007, 1044 (1996), enfd. 140 F.3d 169 (2d Cir. 1998).

[22] See Toyota of San Francisco, 280 NLRB 784, 801 (1986).

[23] See Atlanta Hilton & Tower, 271 NLRB at 1603.

the time available for negotiations since the 120-day contract extension was due to expire just a little over three weeks later on June 4. Then, when the parties did meet on May 12, the Employer was not willing to discuss economics, even though it had prepared a full proposal, including economics.[24] The Union, in contrast, arrived at the first bargaining session and tendered a complete contract proposal, including offers on wages and benefits. Even on May 25, when the Union noted that the current contract would soon expire (in about 10 days), the Employer was still not willing to submit a proposal on economic terms. It was not until six days later, on May 31, that the Employer first made its economic proposal with only four days remaining to bargain before the contract expired on June 4. The Employer's unexplained delay in meeting before May 12, combined with its unwillingness to discuss economics earlier in the bargaining process, left little room to fully explore and negotiate the economic part of each party's package. This is particularly so in light of the fact that the parties had bargained for almost three weeks on non-economic terms, and neither party had indicated that economic issues could be dealt with quickly, e.g., because neither contemplated major changes from the status quo. The Employer especially recognized that meaningful bargaining would be protracted because it knew what the Union had proposed and the composition of its own unsubmitted proposal. After devoting three weeks to negotiating non-economics, it was unreasonable for the Employer to insist upon leaving just six days to negotiate the economic terms.

Once the Employer unreasonably truncated the time allotted for bargaining, it manipulated that delay in an attempt to force agreement from the Union. Thus, the Employer presented its last, best, final offer at 5:20 p.m. on June 3, and gave the Union only until the contract expired at 7 a.m. the next morning to consider and accept the offer or face a lockout. That short deadline of about 12 hours, accompanied with the threat of a lockout absent acceptance, precluded the Union from having the opportunity to adequately consider the Employer's final offer.[25]

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[24] When the Employer finally offered its economic proposal on May 31, the document was dated May 12, indicating that the Employer had prepared the economics in time for the May 12 negotiating session.

[25] See Toyota of San Francisco, 280 NLRB at 801 (employer repeatedly set short deadlines of two to four days for union to accept "final" offers, while simultaneously threatening to substitute harsher, "final/final" offers; ALJ found this "ultimatum" bargaining did not "lend itself to reasoned

The Employer's bad faith is even more striking in light of its failure to provide information sufficient to allow the Union and the employees to adequately evaluate its final offer. Because of the looming threat of a lockout, the Union held a meeting of employees on June 3 to discuss the Employer's final offer. The employees expressed several concerns at the meeting, including the Employer's demand that for the first time they pay health insurance premiums, and a proposed change in their 401(k) plan. However, as of that date, the Employer had failed to provide the Union with the average hourly employee wage and benefit rate[26] and copies of the health insurance plans the Employer had proposed on May 31.[27] The Employer also had not provided the Union with a copy of the Employer-National Starch sales agreement or the name, address, telephone number of the pension plan administrator. Under these conditions, the members reasonably believed they could not make an informed decision on the Employer's final offer without having the requested information, so they decided to not hold a ratification vote until the information was provided. Thus, the Employer's failure to provide relevant information in a timely manner had a direct and evident impact on the ability

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thinking ... [and left] little room for debate and no room for counteroffers.").

[26] The Employer asserts that the Union already had this information because it was provided in December 2004 during negotiations for the 120-day contract extension. This ignores the fact that the Employer's benefit costs had changed in February 2005 when it unilaterally changed the employees' health insurance plan from UniCare to Aetna. The Employer finally provided the Union with the average hourly wage and benefit rate on June 10. This response still failed to satisfy the Union's information request because it was based on 2004 figures and did not account for the change in health care plans in February 2005.

[27] The Employer asserts that it did provide the Union with copies of the proposed health insurance plans, i.e., the Aetna POS II, Out-of-Area, and Dental plans, when it made its economic proposal at the May 31 bargaining session. The Union asserts that it did not receive copies of the plans on that date. Rather, the Union asserts that it received a copy of the POS II plan on June 4, the Out-of-Area plan on June 10, and the Dental plan on June 13. In agreement with the Region, we credit the Union because it submitted copies of the plans with handwritten receipt dates and it also submitted a copy of a June 2 information request where the receipt dates for the plans are handwritten in the margins.

of the parties to obviate the need for a lockout and to reach agreement.[28] Combined with its failure to allow time for meaningful bargaining over economic terms before locking out its employees, this conduct evidences an intent to frustrate the bargaining process. Accordingly, the Employer violated Section 8(a)(5) and (1) by bargaining in bad faith before the June 5 lockout, including the health insurance change discussed in fn. 2.

B. At a Minimum, the Employer Began Bargaining in Bad Faith when It Submitted a Regressive Contract Proposal on July 6

Even if the evidence does not prove that the Employer bargained in bad faith from the outset of negotiations, we conclude that, at a minimum, the Employer began bargaining in bad faith as of July 6, when it submitted an unreasonable and regressive contract proposal to the Union. Although the Board does not determine whether "particular proposals are either 'acceptable' or 'unacceptable' to a party ... [it does] consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective bargaining contract."[29] In Wisconsin Steel Industries, the Board found bad faith bargaining where the employer, among other things, proposed a substantial wage reduction (ranging from about 14% to 26%) and that employees pay half of their uniform costs.[30] The employer adhered to these proposals in the context of having reneged, "without valid excuse," on every tentative agreement the parties had reached during months of bargaining because it insisted on "bargaining from scratch."[31]

This case is similar to Wisconsin Steel because the Employer's July 6 regressive proposal sought substantial wage reductions for the helpers, who comprised about 50 of the 150 unit employees, and assistant operators. The proposal would reduce wages by about 30% and 19%,

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[28] Cf. E.I. du Pont Co., 346 NLRB No. 55, slip op. at 5-6 (2006) (employer's failure to adequately respond to information request undermined bargaining because union was precluded from formulating counterproposal).

[29] Reichhold Chemicals, Inc., 288 NLRB 69, 69 (1988), enfd. in relevant part sub nom. Teamsters Local 515 v. NLRB, 906 F.2d 719, 726-727 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

[30] 318 NLRB 212, 212, 222 (1995).

[31] Id. at 222.

respectively. As discussed further below, this decrease was also a withdrawal from prior bargaining proposals, especially concerning the wages of helpers and assistant operators. In these circumstances, the Employer's regressive wage proposal demonstrates the Employer's intention to frustrate agreement.

The Employer's bad faith is further demonstrated by the fact that the July 6 proposal withdrew from numerous tentative agreements that were contained in the Employer's June 3 final offer. Of most significance, the Employer withdrew from several tentative agreements regarding the non-economic terms of maintenance employees[32] and substituted a proposal that eliminated 37 unit positions through the subcontracting of the maintenance, warehouse, and janitor functions. The Employer also withdrew from the following tentative agreements and replaced them with regressive terms: the agreement to allow eight carry-over vacation days was replaced with no carry-over days; the agreement on the number of vacation days employees earned based on years of service was replaced with less favorable terms for employees with more than 10 years of service; the Employer also withdrew the parties' agreements on the retroactivity of shift differential pay and 401(k) matching contributions and the code of conduct.

As stated above, "the withdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed upon."[33] Although a party's reasons need not be totally persuasive, they must not be "'so illogical' as to warrant the conclusion that the Respondent by offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement."[34] Where an employer provides no explanation for its withdrawal from a tentative agreement, the requisite showing of good

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[32] For example, the parties tentatively agreed to language on aptitude tests, training, and work assignments. Also, the parties had reached tentative agreement on the job duties of the SAC warehouseman.

[33] Suffield Academy, 336 NLRB 659, 659 (2001), enfd. 322 F.3d 196 (2d Cir. 2003) (citing Driftwood Convalescent Hosp., 312 NLRB 247, 252 (1993), enfd. mem. sub nom. NLRB v. Valley West Health Care, 67 F.3d 307 (9th Cir. 1995)).

[34] Oklahoma Fixture Co., 331 NLRB 1116, 1118 (2000) (citations omitted), enfd. 332 F.3d 1284 (10th Cir. 2003) (en banc).

cause is lacking and the Board will find that the withdrawal was motivated by bad faith.[35] Where an employer does assert "good cause" for withdrawing from a tentative agreement, the Board scrutinizes the validity of that justification to determine if the employer was in fact acting in good faith.[36]

In Suffield Academy, the employer asserted that it had withdrawn from a tentative agreement to provide the union's health insurance plan because it had improved its wage offer.[37] However, an examination of the employer's pre- and post-withdrawal proposals showed that the employer had not improved its wage offer.[38] Thus, the Board found that the employer violated Section 8(a)(5) by withdrawing from the tentative agreement because its true motive was "to frustrate the bargaining process."[39]

Similarly, in Homestead Nursing & Rehabilitation Center, the employer withdrew from tentative agreements to grant nurses aides a $0.40 per hour raise upon state certification and to provide photo identification for all employees.[40] To justify its withdrawal from the former agreement, the employer asserted that its new proposal for a $0.25 raise was retroactive. The Board rejected this explanation, in part, because no evidence supported the

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[35] See, e.g., Driftwood Convalescent Hosp., 312 NLRB at 252.

[36] See, e.g., Suffield Academy, 336 NLRB at 659, 669-670; Homestead Nursing & Rehabilitation Center, 310 NLRB 678, 678, 681 (1993); Natico, Inc., 302 NLRB 668, 670-671 (1991); Arrow Sash & Door Co., 281 NLRB 1108, 1108 n.2 (1986).

[37] See 336 NLRB at 669.

[38] Id. In his concurring opinion, Chairman Hurtgen also found that the employer had acted in bad faith because "there was no change" to the employer's pre- and post-withdrawal wage offers. Id. at 661 & n.7.

[39] Id. at 659, 669. The ALJ also found that the employer failed to show that it would have saved money by retaining its old health plan because the cost of that plan increased over the term of the proposed contract while the cost of union's plan remained fixed. Finally, the ALJ found no merit to the employer's reasoning that it had withdrawn from the tentative agreement because it had agreed to other union proposals. Id. at 669-670.

[40] See 310 NLRB at 678, 680-681.

employer's claim that the new offer was retroactive.[41] Regarding the agreement to provide photo certification for employees, the employer asserted that it withdrew the agreement because it determined the proposal would have been too expensive. However, the evidence showed that the employer never costed out the proposal and, therefore, had no good cause for withdrawing from it.[42] Thus, the employer violated Section 8(a)(5) by withdrawing from the tentative agreements without good cause.[43]

As in Suffield Academy and Homestead Nursing, the Employer here failed to provide the requisite "good cause" for withdrawing from the parties' tentative agreements and then submitting a regressive proposal. At the bargaining table on July 6, the Employer presented the Union with its "Talking Points" memorandum to justify its withdrawing from tentative agreements and substituting a regressive proposal. In that memorandum, the Employer asserted that it had learned during the one month since the lockout began that it could be "more competitive by outsourcing some non-operations functions" and that it could "operate at less cost and with fewer personnel." However, when the Union analyzed the Employer's June and July labor and expense reports, it found that the Employer's operating costs were actually higher during the post-lockout period. Indeed, the Employer admits that its costs increased.[44] Moreover, the Employer asserts it is operating with fewer employees but fails to address the fact that after the lockout, a change from three 8-hour shifts to two 12-hour shifts. Thus, the Employer's assertion about "operat[ing] at less cost" cannot provide the requisite "good cause" to justify the Employer's withdrawal from numerous tentative agreements.[45]

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[41] Id. at 678 & n.4. The Board also relied on the statement of the employer's negotiator that she lacked authority and that the employer did not want to encourage union activity at its other facilities, where nurses aides only received $0.25 increases after becoming state certified, by granting a $0.40 increase at this facility. Id. at 678, 680.

[42] Id. at 681.

[43] Id. at 678, 680, 681.

[44] Although the Employer asserts that its costs decreased in August and subsequent months when the incidental costs associated with its temporary replacements decreased, such as housing, meals, and training, it cannot rely on those later alleged cost savings to justify its claim of decreased costs in July.

[45] [*FOIA Exemption 5*

We also reject the Employer's other post-hoc assertions that it had "good cause" to withdraw from its tentative agreements with the Union. First, the Employer asserts that it originally offered more favorable terms in exchange for quick agreement but then, when a prolonged labor dispute arose, was justified in substituting a regressive offer containing the contractual terms it actually wanted.[46] Second, the Employer relies on the increase in its bargaining strength stemming from its ability to continue operating during the lockout.[47] Third, the Employer relies on the fact that it learned during the lockout that it could operate with fewer employees, attract temporary employees willing to accept lower wages, and that it could successfully contract out certain functions.[48] Finally, the

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[46] The Employer relies on, e.g., White Cap, Inc., 325 NLRB 1166, 1169 (1998) (no bad-faith where employer first offered more favorable terms in exchange for union accepting revised work schedule by certain date and then substituted regressive proposal after union rejected revised schedule), enfd. sub nom. Graphic Communications Local 458-3M v. NLRB, 206 F.3d 22 (D.C. Cir. 2000); Hyatt Regency Memphis, 296 NLRB 289, 315 (1989) (regressive economic proposal not in bad faith where employer made first proposal in exchange for quick agreement).

[47] The Employer relies on, e.g., Challenge-Cook Bros., 288 NLRB 387, 389 (1988); Hickinbotham Bros., Ltd., 254 NLRB 96, 102 (1981) ("It is not illegal for an employer who has weathered a strike to capitalize upon its new found strength to secure contract terms it desires.").

[48] The Employer relies on, e.g., Hendrick Mfg. Co., 287 NLRB 310, 311 (1987) (no bad faith where employer made regressive proposal after learning during strike it could operate with 30 fewer employees at a lower wage rate); Hickinbotham Bros., Ltd., 254 NLRB at 102 (no bad faith for making

Employer asserts that this is not a case where a regressive proposal was substituted just as the Union was about to accept the previous proposal. Rather, the Union members rejected the Employer's final offer on June 15 and this justified the Employer in substituting a regressive proposal.[49]

Because all of these alleged justifications rely on changed circumstances after the lockout began -- be it the onset of a prolonged labor dispute or the ability to continue operations -- we conclude that the Employer has failed to demonstrate the requisite "good cause" for withdrawing from tentative agreements. There are no changed circumstances here. The Employer had been making arrangements for temporary replacements as early as February -- well before the parties started negotiating on May 12. Based on these preparations, the Employer knew before the lockout that (1) temporary replacements were available and (2) they were available at less cost. Also, the fact that the Employer had arranged for temporary replacements and security in advance, undermines its assertion that it initially offered more favorable terms in exchange for quick agreement and in an effort to avoid a prolonged labor dispute. Instead, it appears the Employer was actually planning for a protracted labor dispute as early as February when a temporary agency began advertising for maintenance workers at the Employer's Meredosia plant. More important, the fact that the Employer had made these advance arrangements also demonstrates that it did not learn any new facts, such as "the ability to attract temporary replacements or their wage rates," during the period of the lockout between June 5 and July 6. It had to be well aware of the cost of temporary replacements from the contracts it had entered to prepare for the lockout.

Finally, the Employer also cannot rely on the Union rejecting its June 3 offer as "good cause" for withdrawing from tentative agreements because it told the Union it would not continue bargaining unless the Union held a ratification vote. Although the unit employees at the June 15 meeting were still concerned that the Employer had yet to respond to the Union's information requests, the Union convinced them

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regressive proposal where, among other reasons, employer learned during strike that subcontracting certain operations resulted in savings).

[49] The Employer relies on, e.g., Oklahoma Fixture Co., 331 NLRB at 1119 (no bad faith where employer withdrew specific portions of rejected proposal that employer had offered in exchange for elimination of hiring hall provision).

to hold a vote after informing them that the Employer would not bargain absent a ratification vote.[50] In short, the Employer has failed to show "good cause" for withdrawing from the numerous tentative agreements contained in its June 3 final offer. Thus, the Employer's July 6 regressive proposal evidences an intent to frustrate the bargaining process and, together with the Employer's pre-lockout bargaining conduct, constitutes bad-faith bargaining in violation of Section 8(a)(5) and (1).[51]

Moreover, although the rule requiring an employer to demonstrate "good cause" for withdrawal usually refers explicitly to tentative agreements, the Board apparently has applied it to withdrawal of bargaining proposals or concessions made even in the absence of tentative agreement.[52] Therefore, we would also apply this rationale to find the Employer's regressive wage offer supports a finding of overall bad-faith bargaining.

II. THE LOCKOUT WAS UNLAWFUL, EITHER FROM INCEPTION OR FROM JULY 6, WHEN THE EMPLOYER MADE ITS REGRESSIVE BARGAINING PROPOSAL

A lockout may be lawful, despite employer unfair labor practices, if it is "solely" in support of a "legitimate bargaining position" and not materially motivated by the unfair labor practices.[53] On the other hand, a lockout that

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[50] This case is therefore distinguishable from Oklahoma Fixture Co., 331 NLRB at 1119, where the union voluntarily rejected the employer's offer. In that case, the union did not reject the employer's offer in response to the employer's threat to not resume negotiations absent a ratification vote.

[51] See Driftwood Convalescent Hosp., 312 NLRB at 247, 252-253 (employer bargained in bad faith where it withdrew, without explanation, from tentative agreements and prior bargaining proposals and then substituted regressive proposals and set short deadline for union to accept final offer before withdrawing final offer).

[52] See, e.g., Driftwood Convalescent Hosp., 312 NLRB at 247, 252-253 (referring to "proposals previously made" and "bargaining proposals"); Arrow Sash & Door Co., 281 NLRB at 1108, n.2 (referring to "concessions made").

[53] See, e.g., Hess Oil & Chemical Corp., 167 NLRB 115, 117 (1967) (lockout was lawful because it was not in support of employer's unlawful demand to exclude warehouse and laboratory employees from certified bargaining unit), enfd. 415 F.2d 440 (5th Cir. 1969), cert. denied sub nom. Oil,

that is not solely in support of a legitimate bargaining position and motivated by some form of bad faith bargaining violates Section 8(a)(1), (3), and (5).[54] For example, in Horsehead Resource Development Co., the Board found a lockout unlawful because it was a product of the employer's bad faith bargaining, which involved various dilatory tactics.[55]

This case is similar to the Board's decision in Horsehead Resource Development. As set forth in the previous section, the Employer here had engaged in bad-faith bargaining from as early as May 12, and certainly no later than July 6. Thus, the Region should allege that the Employer's lockout was in support of an illegitimate bargaining position and, therefore, violated Section 8(a)(1), (3), and (5) from the date that the Employer is found to have engaged in bad-faith bargaining.[56]

Chemical & Atomic Workers v. NLRB, 397 U.S. 916 (1970). See generally American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965).

[54] See, e.g., Horsehead Resource Development Co., 321 NLRB 1404, 1404 (1996) (lockout violated Section 8(a)(1), (3), and (5) where it was product of employer's bad faith bargaining), enf. denied 154 F.3d 328 (6th Cir. 1998); Branch Intl. Services, Inc., 310 NLRB 1092, 1104-05 (1993) (lockout violated 8(a)(1), (3), and (5) where used to force employees to accept employer's unlawful demand that truck drivers be excluded from certified unit), enfd. mem. 12 F.3d 213 (6th Cir. 1993) (uncontested order); D.C. Liquor Wholesalers, 292 NLRB 1234, 1237, 1258 (1989) (lockout violated 8(a)(1), (3), and (5) where employer had first erroneously declared impasse and unilaterally implemented final offer), enfd. sub nom. Teamsters Local 639 v. NLRB, 924 F.2d 1078, 1085 (D.C. Cir. 1991); Clemson Bros., 290 NLRB 944, 945 (1988) (lockout violated 8(a)(1) and (3) because initiated while employer bargained in bad faith by not allowing union to verify claim of inability to pay).

[55] See 321 NLRB at 1404. The Sixth Circuit reversed the Board's finding in Horsehead Resource that the lockout was unlawful only after first reversing the Board's finding that the employer had bargained in bad faith. See 154 F.3d at 340.

[56] The Region should also allege, in the alternative, that the lockout was unlawful since July 6 because it was in furtherance of the Employer's unlawful withdrawal from tentative agreements, which independently violated 8(a)(5).

Moreover, the Region should also allege that the Employer's lockout was unlawful from its inception due to the Employer's failure to timely respond to the Union's pre-lockout information requests. In Globe Business Furniture, Inc., the employer locked out its employees after failing to provide the union with information it requested for bargaining over the employer's proposals on health insurance and increased use of temporary employees.[57] The Board held that the employer violated Section 8(a)(3) and (1) by locking out its employees because the "lockout was implemented following the Respondent's repeated, unlawful refusals to provide the Union with information it had requested for bargaining" and, therefore, the lockout could not be legitimate.[58]

Here, as in Globe Business Furniture, before locking out its employees on June 5 the Employer failed to provide the Union with requested information needed for bargaining. As of the Union meeting on the evening of June 3, where the members were presented with the Employer's final, pre-lockout offer, the Employer had yet to provide the Union with the average hourly wage and benefit rate, copies of the proposed health plans, a copy of the Employer-National Starch sales agreement, and the names, address, and telephone number of the pension plan administrator. The Union members decided not to hold a ratification vote on the offer because they felt they could not make an informed decision without having the requested information. The Employer did not provide this information before it locked out the unit employees. Thus, as in Globe Business Furniture, the lockout violated Section 8(a)(3) and (1) because the Employer had failed to timely provide information the Union had requested for bargaining.

III. THE EMPLOYER VIOLATED SECTION 8(a)(5) AND (1) BY FAILING TO PROVIDE THE UNION WITH REQUESTED INFORMATION ABOUT ITS POST-LOCKOUT OPERATIONS

It is well established that an employer's bargaining obligation "imposes on an employer the duty to furnish a union, upon request, information relevant and necessary to enable [the union] to intelligently carry out its statutory obligations as the employees' exclusive bargaining

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[57] 290 NLRB 841, 841 (1988), enfd. 889 F.2d 1087 (6th Cir. 1989) (unpublished table decision).

[58] Id., 290 NLRB at 841, n.2. The Board did not find an 8(a)(5) violation because, apparently, none was alleged in the complaint. Id. at 841.

representative."[59] The standard of relevancy is a liberal, discovery-type standard.[60] Thus, it is sufficient if the union's request for information is supported by "probable" or "potential" relevance.[61]

Here, we first conclude that the Union's August 12 request for copies of customer complaints, quality control sheets, certificates of analyses, bills of lading, and invoices for goods received, was relevant. The Union requested this information in its ongoing and frustrated attempt to examine the validity of the Employer's justifications for its July 6 regressive proposal. The Employer made the claim about setting production records while attempting to justify its withdrawal from numerous tentative agreements and submitting in their place a regressive bargaining proposal that eliminated almost 25% of the unit and substantially cut the wages of a large segment of the remaining unit employees. The Union explained in its request that the prior information it had received from the Employer did not support the latter's assertion that it was operating at less cost. As of August 12, the date the Union requested this information, the Employer still had not provided data that would have allowed the Union to determine if production records actually had been set during the first month of the lockout.[62] Against this background, the Union had satisfied the low burden for showing why the information was relevant to its role as bargaining agent. Since the Employer did not fully respond to the Union's request, and provided only the number of documents associated with each information request rather than copies of the actual documents, the Employer violated Section 8(a)(5) and (1).

Although the Employer claims it was privileged to withhold the information requested by the Union, we reject its various defenses. First, although the Employer claims that it never relied on setting production records during the lockout as justification for making its regressive

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[59] Florida Steel Corp., 235 NLRB 941, 942 (1978), enfd. in relevant part 601 F.2d 125, 129 (4th Cir. 1979). See also NLRB v. Acme Industrial Co., 385 U.S. 432, 435 (1967).

[60] See NLRB v. Acme Industrial Co., 385 U.S. at 437 & n.6.

[61] See Florida Steel Corp., 235 NLRB at 942.

[62] Although the Employer's August 5 information response listed three production records that had been set, the Union could not assess the validity of those asserted records without the additional information it requested on August 12.

proposal, and therefore should not be required to provide information to support that claim, the evidence shows otherwise. The Employer's negotiator made the statement about setting production records on July 6, and repeated his statement the next day. In response to the Union's request for supporting information at the bargaining table, the negotiator agreed on both days to do so and even stated that he would provide more information than the Union wanted. Then, on August 5, the Employer provided information about three production records that had been set during the lockout. Thus, as of the Union's August 12 information request, it reasonably appears that the Employer was still relying on its earlier assertion that it was setting production records. Therefore, the Employer squarely put the issue of production during the lockout at issue in the parties bargaining, and information supporting that claim was relevant.

Second, the Employer's reliance on Richmond Times-Dispatch[63] to suggest it could avoid the information obligation by "retracting" its productivity claim is also erroneous. In that case, the Board held that even assuming the employer had earlier claimed an inability to pay, the employer had not violated Section 8(a)(5) by refusing to provide requested financial information because it had effectively retracted the claim.[64] Richmond Times is distinguishable because, in that case, only a short period of time (eight days) had passed between the employer's alleged claim of inability to pay and its retraction of that claim, all of which occurred before bargaining began. Here, over seven weeks had passed before the Employer equivocally informed the Union in its August 25 letter that it was "operating the plant to its satisfaction with fewer employees, at lower labor rates, and contracting out support functions like maintenance." By that time, the Employer's negotiator already had agreed to provide information and, as noted above, provided a limited amount. Thus, the significant passage of time and the Employer's conduct during that time rendered the Employer's attempted retraction on August 25 ineffective. Richmond Times is also distinguishable because the seven-week passage of time here occurred while the parties were in the middle of negotiations.[65]

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[63] 345 NLRB No. 11 (August 26, 2005).

[64] Id., slip op. at 4.

[65] Richmond Times is further distinguishable because in that case the employer's retraction of claimed inability to pay was clear and unequivocal. Here, the Employer's alleged retraction of its claim that it was setting production

Third, the Employer relies on the Unions' picket line misconduct to assert that it was not obligated to provide the requested production information. The Employer asserts that the requested documents contain the names of its customers and suppliers, and that it legitimately fears the Union will use that information to harass and attack those businesses. The Employer's putative concern is based on pure speculation. The Union primarily directed its picket line activities at the temporary replacement workers, rather than at the Employer's customers and suppliers. Moreover, it is unlikely that the unit employees who worked at the facility from February to June 2005 do not already know the names of the Employer's customers and suppliers, so that providing documents including their names should leave the customers and suppliers no more vulnerable to potential harassment. Finally, even assuming that the Employer has raised a legitimate confidentiality concern,[66] it would not privilege a wholesale refusal to provide the information but would require the Employer to bargain an accommodation of its concerns over confidentiality with the Union's legitimate need for the requested information.[67] The Employer did not satisfy this affirmative duty by merely giving the Union the number of customer complaints, quality control inspections, certificates of analysis, bills of lading, and invoices for goods received, rather than copies of those documents. That response did not properly account for the Union's legitimate interest in the requested information because it provided no usable information for the purpose of evaluating the Employer's claim of setting production records during the first month of the lockout.

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records is its August 25 statement that it was "operating the plant to its satisfaction," which is ambiguous, at best.

[66] Cf. Chicago Tribune Co. v. NLRB, 965 F.2d 244, 247-248 (7th Cir. 1992) (employer lawfully refused to provide names of striker replacements where violence had been directed at those employees and employer had offered alternatives for providing information).

[67] See, e.g., National Steel Corp., 335 NLRB 747, 747-748 (2001) (employer violated 8(a)(5) by flatly refusing to provide union with information about hidden surveillance cameras and by failing to come forward and seek to bargain for an accommodation between union's need for relevant information and employer's legitimate confidentiality concern), enfd. 324 F.3d 928, 934-935 (7th Cir. 2003); Metropolitan Edison Co., 330 NLRB 107, 107-108 (1999) (quoting U.S. Testing Co. v. NLRB, 160 F.3d 14, 20-21 (D.C. Cir. 1998).

Accordingly, the Employer failed to adequately fulfill its duty to accommodate and violated Section 8(a)(5).[68]

In sum, the Region should allege that the Employer violated Section 8(a)(5) and (1) by failing to provide the Union with the requested production information. The Region also should rely on this additional unlawful conduct as further evidence that the Employer bargained in bad faith on and after July 6.

[*FOIA Exemption 5*

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[68] Compare Borgess Medical Center, 342 NLRB No. 109, slip op. at 2 (2004) (where employer refused to provide other incident reports about medication errors, it did not satisfy duty of accommodation by offering to admit that other unit nurses were not disciplined for such errors because that information would not allow union to assess whether circumstances of previous incidents were similar to that of alleged disciminatee), with GTE California, Inc., 324 NLRB 424, 427 (1997) (where employer refused to provide union with name and phone number of unlisted customer who had filed complaint that resulted in discharge of unit employee, it satisfied duty of accommodation by dialing unlisted phone number and then allowing union representative to speak to customer anonymously).

[69] [*FOIA Exemption 5*

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[70] [*FOIA Exemption 5*

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[71] [*FOIA Exemption 5*

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[72] [*FOIA Exemption 5*

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